STATE OF MICHIGAN
IN THE SUPREME COURT

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Plaintiffs/Appellees,

V

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Appellant.

Supreme Court Case No.: 157951

Court of Appeals Case No. 340370

Genesee County Circuit Court
Case No. 17-108637-NF

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PLAINTIFFS/APPELLEE'S CORRECTED ANSWER TO DEFENDANT/APPELLANT STATE FARM'S APPLICATION FOR LEAVE TO APPEAL

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JUDGEMENT APPEALED FROM

Defendant/Appellant State Farm Mutual Automobile Insurance Company seeks leave to appeal the Court of Appeals' May 8, 2018 decision, which reversed the trial court's September 11, 2017 order granting summary disposition to Defendant/Appellant State Farm.

COUNTER STATEMENT OF QUESTIONS PRESENTED

State Farm's No-Fault auto-insurance policy contained a provision that was clearly unenforceable as against the Michigan No-Fault Act, Common Law, and the Public Policy of the State of Michigan. The Court of Appeals, in keeping with over 130 years of precedent, held that the policy was unenforceable to the extent that it was being used to preclude a post-loss chose in action, citing to, amongst others, *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW2d 303 (1880) and *Rory v. Continental Ins. Co*, 473 Mich 457, 491; 703 NW 2d 23 (2005).

Based on the foregoing, the questions presented are as follows:

1. Under this Court's controlling precedent, both historical and modern, which provides that a contract that is contrary to public policy cannot be enforced in such a manner so as to contravene public policy, was the Court of Appeals correct in reviewing the contract provision at issue for compliance with Michigan's public policy?

The Trial Court did not address public policy concerns.
The Court of Appeals answers "Yes"
Plaintiff/Appellee answers "Yes"
Defendant/Appellant answers "No"

2. Is there any reason to change the public policy of the State of Michigan, as expressed in *Roger Williams*, and followed by Courts for over 130 years, as well as expressed in the Michigan No-Fault Act, as well as by this Court's statement in *Covenant v State Farm*, 500 Mich 191; 895 NW2d 490 (2017) (wherein this Court held that "our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider"), which finds that the prohibition of an assignment of a post-loss chose in action is unenforceable as against public policy?

The Trial Court did not address public policy concerns.
The Court of Appeals answers "No"
Plaintiff/Appellee answers "No"
Defendant/Appellant answers "Yes"

INTRODUCTION AND REASONS FOR DENYING LEAVE TO APPEAL

Defendant/Appellant seeks leave from this Court to appeal the unanimous[1] published decision of the Court of Appeals finding that Defendant/Appellant's interpretation of the "anti-assignment" provision in its insurance policy to preclude assignment of a chose in action was unenforceable, a decision based upon long-standing Supreme Court precedent and long-standing public policy of the State of Michigan. In its application for leave to appeal, Defendant/Appellant asks this Court to overturn over 130 years of precedent and public policy.

At the oral argument of *Covenant v State Farm*, 500 Mich 191; 895 NW2d 490 (2017), Defendant/Appellant State Farm argued to this very Court that a decision in its favor would have minimal impact as far as security for ensuring payment to providers for their services, because medical providers could obtain assignments from the patients to pursue claims for benefits. State Farm touted that assignments would provide security for the providers, and certainty for insurers regarding who owned the claims at issue. State Farm explained that prohibiting direct action by medical providers, and the use of assignments would leave "no question on the part of the insurance company" as to the proper party to receive payment, and the use of assignments would "*help(s)* the insurance companies" make those proper payments. This argument was proffered to assuage the concerns raised by this Court that medical providers, such as hospitals, doctors, nurses, and therapists, would no longer be able to realistically enforce their rights to payment for services rendered. Defendant/Appellant never claimed, as it is doing now, that assignments are "unworkable." *Covenant* changed an economic and

[1] To be clear, unanimous as to the issue for which Defendant/Appellant seeks leave to appeal.

legal framework that had been relied upon for decades; No doubt in reliance upon State Farm's argument and assurances, this Court, in its written opinion in *Covenant*, specifically indicated that it did not, by way of its opinion, "intend to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider". The right of a patient to assign, and for a provider to receive and assignment, is inextricably intertwined with the Supreme Court's decision in *Covenant.*

The No Fault Statute itself provides that under section 500.3143, an insured cannot assign a right to a benefit payable in the future; it is well established that the expression of one thing in a statute is the express exclusion of another. *Excluded* from the statute is any prohibition of assignment of a right to a presently due or past due benefit. Public Policy, as reflected by the no fault statute, and the basis of the no-fault statute, and indeed, as reflected in other statutes, undoubtedly allows assignments after a loss as accrued.

Despite the fact that the approval of the assignment of a chose in action/assignment of the contract after a loss has accrued has long been recognized by the Michigan Legislature and the Courts of the State of Michigan, Defendant/Appellant argues that the *Roger Williams* case has been overruled, if not expressly, then by implication. There is no basis for such a claim. The *Roger Williams* Court recognized the distinction between pre-loss assignments, which can be prohibited, and post-loss assignments, which cannot be prohibited. Defendant/Appellant argues that the statute referenced in *Roger Williams*, CL 1871, §5775, no longer exists. However, that statute, which provided for the right of an assignee of a chose in action to sue in its own name ("the real party in interest rule") is now set forth at MCL 600.2041 and MCR 2.201(B).

The Michigan Supreme Court has recognized that an assignee is the "real party in interest" in an action and may bring the action in its own name where the assignment is such that satisfaction of the judgment obtained by the assignee will discharge the defendant from his obligation to the assignor. *Kearns v Michigan Iron & Coke Co*, 340 Mich 577; 66 NW2d 230 (1954).

Defendant/Appellant relies upon a fundamental misinterpretation of the case of *Rory v. Continental Ins. Co*, 473 Mich 457, 491; 703 NW 2d 23 (2005), by arguing that approval of contract language by the insurance commissioner is the equivalent of a judicial proclamation as to the legality, enforceability, applicability and interpretation of a term in an insurance policy. *Rory* did not contain such a holding, and specifically was limited to issues regarding "reasonableness" of a provision in a contract of insurance, as opposed to "public policy", and clearly established that Courts still have the power to determine whether or not insurance policies violate public policy:

> ...***unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy.*** Judicial determinations of "reasonableness" are an invalid basis upon which to refuse to enforce unambiguous contractual provisions. Traditional defenses to enforcement of the contract at issue, such as waiver, fraud, or unconscionability, have neither been pled nor proven. Moreover, nothing in our law or public policy precludes the enforcement of the contractual provision at issue. ***Finally, in the specific arena of insurance contracts, the Legislature has enacted a mechanism whereby policy provisions may be scrutinized and rejected on the basis of reasonableness. This responsibility, however, has been explicitly assigned to the Commissioner.*** (Emphasis added).

The issue in the case at bar is not "reasonableness" of a contractual provision, as it was in *Rory*, but whether or not a contractual provision should be enforced in a way

that would be contrary to long-standing public policy and Supreme Court precedent of allowing for the assignment of a chose in action.

The Supreme Court has already ruled against Defendant/Appellant, 16 years ago, on this very issue – i.e., approval by the Insurance Commissioner is not tantamount to approval of the legality or compliance with public policy. In *Cruz v State Farm Mutual Automobile Insurance Company*, 466 Mich 588; 648 NW2d 591 (2002), a provision in a State Farm No-Fault policy which required an Examination Under Oath as a pre-requisite to no fault benefits was held to be unenforceable if interpreted in that matter, despite approval of the policy language by the insurance commissioner. The Supreme Court held that policy provisions approved by the commissioner may well be valid, *but only when interpreted in accordance with the law*.

Approval of an insurance policy by the commissioner (which, as more fully set forth in the attached brief, could also be provided if the commissioner simply didn't review the policy, and did nothing for more than 30 days after submission to the Commissioner) only applies to *reasonableness*, and further, per *Cruz*, the language of the contract of insurance can be harmonized with the no-fault law, by precluding assignment of future benefits, as is set forth in section 3143 of the No Fault Act, or by precluding the assignment of the policy itself, which is the *rasion d'etre* of anti-assignment clauses in insurance contract - to prevent an insurer from underwriting a risk it did not agree to underwrite.

Roger Williams has been cited in 20 cases (per Shepherd's); 18 of those cases relied upon *Roger Williams* for the idea that a post loss assignment cannot be prohibited, and thus, incorporates that same "public policy" underlying the decision; 12

of those were in Michigan courts (7 of those Michigan Courts being Federal Courts), and the balance were courts around the country. Perhaps the reason that it has not been featured in more published opinions, is because the public policy set forth in *Roger Williams* is so clear and strong that people never bothered to argue or act to the contrary.

Detroit Greyhound is entirely consistent with the *Roger Williams* decision and the public policy surrounding the same. *Detroit Greyhound* didn't deal with a post-loss assignment; thus, *Roger Williams* is not implicated, and the public policy therein is not contravened.

Roger Williams certainly is as applicable to a No Fault claim as any other insurance claim. Whether or not the insurance pays craftsmen and women to rebuild a livery, or pays hospitals, doctors, and therapists to provide treatment for an injured person, the fundamental logic applies – a post loss assignment/assignment of a chose in action cannot be prohibited, and the purpose of any anti-assignment provision is to ensure that the insurance company does not incur a risk that it did not agree to insure.

Perhaps most troubling is Defendant/Appellant's cavalier statement "Why should a court care if two competent contracting parties agree that they only want to deal with each other going forward and therefore agree to limit assignment?" The issue isn't the competency of the parties, the issue is that parties cannot agree to contract provisions that contravene public policy. The purchase of a No-Fault insurance policy is not like purchasing a can of beans; if a person wants to drive a car, that person must, ***as a matter of law***, buy this product, a product available from only a handful of insurance companies who underwrite no fault policies in Michigan. These are not negotiated

agreements between two parties who individualize the contracts to suit their needs and desires. Defendant/Appellant has not shown in this case that the policy provisions were ever disclosed to the purchaser of the policy before the policy was purchased; in fact, it would be safe to say that most insurance policies are purchased, and then only after the purchase is made, does the policy itself ever get mailed to an insured. The only negotiation that takes place is "how much coverage do you want?" There is even more of a "public policy" to be enforced with regard to the mandatory purchase of an insurance policy, regulated by statutes and case law, than Defendant/Appellant cares to admit.

There is nothing new presented by the *Shah* decision, as it relied on unexceptional and uncontroverted precedent long established by the state of Michigan and the Supreme Court. State Farm told this Court during its oral argument in *Covenant* that assignments would be helpful to the insurance companies. State Farm told this Court that assignments were a viable option to protect providers and patients. State Farm told this Court that there would be "finality" with assignments. State Farm approved of the idea of assignments, and yet now comes before this Court and argues that it has over a thousand cases where the "validity of the Assignment Clause is an issue". *If there is an "issue" with assignments, it is because State Farm continues to seek procedural ways to avoid paying for its insureds' medical treatment.* However, this so-called "issue" is no longer a problem. The Court of Appeals in this matter has resolved that issue; *Shah* lays to rest a question that Defendant/Appellant has raised in over 1000 of its cases, and that other no-fault carriers have likewise tried to exploit in an effort to avoid paying what is justly due.

Hospitals, doctors, nurses, and other health care practitioners are not the only entities who would be adversely affected by the idea that a post-loss assignment could be prohibited. The mechanic who fixes a car after an accident. The carpenter who rebuilds a house after a flood or fire. The insured who, hoping to get the benefit of the insurance bargain, assigns the right to collect the claim to the entity that helps him, will now have to pay up front for services that previously were services that workers would be willing to provide, with the security of an assignment.

Shah simply fulfils the promise of the No Fault Act (including the purpose of "provid(ing) victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 578-79; 267 NW2d 72 (1978)) by allowing insureds to obtain their treatment and place the burden of collecting payment for the cost of that treatment upon the entity that benefits economically from providing that service. We want the insured to get their medical care and treatment. We want to make sure that the money for that treatment, in fact, gets used for treatment. The fact that the No-Fault act allows for assignments, and specifically prohibits assignments of benefits payable in the future, is proof that the point is to make sure that the insureds get their no-fault benefits. If a provider is not assured that it can, in fact, get paid, that discourages providers for providing medical care and treatment. That means that the pool of available providers will shrink, and therefore, the costs of treatment will rise. People will not be able to see a doctor for weeks, if not months. Doctors will demand security for payment – a credit card on file, a bond, a lien on a house or investment account, all because they cannot be assured of payment, because the patient, who is entitled to assurance of payment him or herself,

cannot assure the provider by way of assignment. What happens to those people to can't post a bond? What happens to those people who can't pay up front? What happens to those people who have nothing to assure their doctors of payment? Thus, this isn't merely an issue between "two contracting parties". It is very much a public policy issue.

PROCEDURAL AND FACTUAL BACKGROUND

a. Trial Court proceedings.

Plaintiffs/Appellees herein are medical care providers who provided treatment to George Hensley, an individual who suffered injury as a result of an automobile accident.

Suit was filed February 24, 2017. While the suit was pending, on May 25, 2017, the Michigan Supreme Court decided the case of *Covenant v State Farm*, 895 NW2d 490; 2017 Mich LEXIS 971 (2017). In *Covenant*, the Michigan Supreme Court held that providers do not have a direct cause of action against insurance companies under the No Fault Act. The Supreme Court did not rule that a provider cannot have a direct cause of action, and specifically cited to, by way of example, through the use of assignments, as a manner by which a provider could have a cause of action.

On July 17, 2017, Defendant/Appellant filed a Motion for Summary Disposition, pursuant to MCR 2.116(C)(8) (**Exhibit A**). The entirety of the Motion and Brief, including captions and signature blocks, was 6 pages. The motion and brief can be summarized by saying "*Covenant* says a provider doesn't have a private, statutory cause of action."

On August 7, 2017, Plaintiffs/Appellees filed an answer to the Motion for Summary Disposition, along with a request to amend their Complaint. (**Exhibit B**) Plaintiffs/Appellees, with their answer, presented an assignment signed by Mr. Hensley

on July 11, 2017. Plaintiffs/Appelless argued that not only did they have an assignment, but to the extent that State Farm argued that their policy language prohibited the assignment of rights, such a provision was invalid and unenforceable, that Plaintiffs should be allowed to amend their pleadings under MCR 2.116(I)(5), and that *Covenant* should apply prospectively.

That same day, Plaintiffs/Appellees filed a motion to amend, to allege that they have been assigned the claim of Mr. Hensley (**Exhibit C**)

On September 6, 2017, Defendant/Appellant filed a 12 page "response" to the Answer. (**Exhibit D**). That same day, Defendant/Appellant filed an answer to the motion to amend. In both documents, the Defendant/Appellant argued that the policy precludes assignment; specifically, the language that provides "No assignment of benefits or other transfer of rights is binding upon us unless approved by us." Defendant/Appellant further argued that the amendment would be futile, due to the "one year back" rule contained in the Michigan No Fault Act.

On Monday, September 11, 2017, the Trial Court heard Defendant's Motion for Summary Disposition. The Court, in granting the Defendant's Motion for Summary Disposition, held as follows:

> ...And apparently only after the *Covenant* did an assignment take place and the policy language of the State Farm policy, which Mr. Hensley purchased precludes the assignment without approval of State Farm, which did not occur. So actually (inaudible) did not acquire any rights by virtue of the assignment.

Plaintiffs/Appellees timely filed an appeal as of right.

b. Proceedings at the Court of Appeals.

In light of the fact that State Farm limits its request for leave to appeal to the issue of the enforceability of the anti-assignment clause, so too shall Plaintiffs/Appellees limit their discussion to this issue.

Defendant/Appellant filed a motion for expedited hearing. In light of the fact that district courts and circuit courts throughout the state of Michigan had differing opinions as to whether or not these anti-assignment provisions were enforceable, and there was a need for some finality, Plaintiffs/Appellees did not object to the motion. The Court of Appeals granted this motion, and the matter was heard on an expedited basis.

The Court of Appeals, after briefing and oral argument, issued a published opinion, unanimous with respect to the finding of unenforceability of the anti-assignment clause, to the extent it was being used to preclude a post-loss assignment/chose in action. The Court of Appeals, first citing to and relying upon *Rory v. Continental Insurance*, 473 Mich 457, 461; 703 NW2d 23 (2005), noted:

> However, our Supreme Court has also recognized that "courts are to enforce the agreement as written *absent some highly unusual circumstance such as a contract in violation of law or public policy*." *Id.* at 469 (quotation marks and citation omitted; emphasis added). "A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions," and "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of the contract provision." *Id.* at 470. With respect to determining whether a contractual provision violates public policy, our Supreme Court explained in *Rory* that "the determination of Michigan's public policy is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." *Id.* at 470-471 (quotation marks and citation omitted). "In ascertaining the parameters of our public policy, we must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Id.* at 471 (quotation marks and citation omitted).
>
> "Under general contract law, rights can be assigned unless the assignment is clearly restricted." *Burkhardt v Bailey*, 260 Mich App 636,

653; 680 NW2d 453 (2004). Defendant argues in this case that the present matter is one where Hensley's ability to assign his rights is prohibited by a specific contractual provision. The insurance policy states, "No assignment of benefits or other transfer of rights is binding upon *us* [(i.e., defendant)] unless approved by *us*." Despite plaintiffs' newly-raised arguments to the contrary, the language of this provision is perfectly clear. In order for any benefits or rights to be assigned to anyone other than the insured, defendant must consent to the assignment. The assignments at issue attempt to do just that, assigning the right to claim benefits held by Hensley to plaintiffs, and it is undisputed that defendant did not consent to these assignments. The appellate courts of Michigan have previously recognized the enforceability of anti-assignment clauses that are clear and unambiguous. See *Detroit Greyhound Employees Fed Credit Union v Aetna Life Ins Co*, 381 Mich 683, 689-690; 167 NW2d 274 (1969); *Employers Mut Liability Ins Co of Wisconsin v Mich Mut Auto Ins Co*, 101 Mich App 697, 702; 300 NW2d 682 (1980). Thus, because the anti-assignment clause is unambiguous, it must be enforced unless it violates the law or public policy. *Rory*, 473 Mich at 468-469.

Resolution of this issue turns on the application of our Supreme Court's decision in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW2d 303 (1880). In *Roger Williams*, an insurance policy was issued covering livery stable property. *Id.* at 253. The property was destroyed in a fire. *Id.* After the fire, the insured assigned the policy to secure a debt. *Id.* at 253-254. Our Supreme Court refused to enforce an anti-assignment clause in that matter, explaining:

The assignment having been made after the loss did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—secured in this state by statute—to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy. [*Id.* at 254.]

Here, the parties provide no authority, and we have found none, explicitly rejecting this analysis in *Roger Williams*. Moreover, it has been deemed controlling on this point of law in at least two relatively recent opinions of the United States District Court for the Western District of Michigan, *Century Indemnity Co v Aero-Motive Co*, 318 F Supp 2d 530, 539 (WD Mich, 2003) (relying on *Roger Williams* while explaining that under Michigan law, "an anti-assignment clause will not be enforced where a loss occurs before the assignment, because in that situation the assignment of the claim under the policy is viewed no differently than any other assignment of an accrued cause of action."); *Action Auto Stores, Inc v United Capitol Ins Co*, 845 F Supp 417, 422-423 (WD Mich,

1993) (citing *Roger Williams* in support of the proposition that a provision prohibiting assignment without consent of the insurer was invalid with respect to a post-loss assignment).

Our Supreme Court in *Roger Williams* essentially held that an accrued cause of action may be freely assigned after the loss and that an anti-assignment clause is not enforceable to restrict such an assignment because such a clause violates public policy in that situation. *Roger Williams*, 43 Mich at 254. Here, there similarly was an accrued claim against his insurer that was held by Hensley for payment of health care services that had already been provided by plaintiffs before Hensley executed the assignment. Under *Roger Williams*, any contractual prohibition against the assignment of that claim to plaintiffs was unenforceable because it was against public policy. *Id.*

Therefore, we conclude that enforcement of the anti-assignment clause in the instant case is unenforceable to prohibit the assignment that occurred here—an assignment after the loss occurred of an accrued claim to payment—because such a prohibition of assignment violates Michigan public policy that is part of our common law as set forth by our Supreme Court. *Roger Williams*, 43 Mich at 254; *Rory*, 473 Mich at 469-471.

We note that, contrary to the arguments advanced by defendant, the conclusion that a contractual provision is unenforceable due to violating public policy is not equivalent to a judicial assessment of unreasonableness, nor is it in conflict with the principle that unambiguous contracts must be enforced as written. Our Supreme Court has made clear that judicial notions of reasonableness are not proper grounds on which to hold contractual provisions unenforceable. *Rory*, 473 Mich at 470. Our Supreme Court has also made clear that unambiguous contractual provisions are "to be enforced as written *unless the provision would violate law or public policy*." *Id.* (emphasis added). Defendant's arguments appear to incorrectly conflate the concept of "reasonableness" with "public policy." Our decision is not based on any determination that the anti-assignment clause is somehow "unreasonable." Rather, we have simply concluded that enforcing the anti-assignment clause in this circumstance to prohibit an assignment of an accrued claim after the loss has occurred is against Michigan public policy as stated by our Supreme Court one hundred and thirty-eight years ago in *Roger Williams*. Finally, defendant takes issue with the continued validity of our Supreme Court's holding in *Roger Williams* and its application in the instant case. However, as our Supreme Court has instructed, we are bound to follow its decisions "except where those decisions have *clearly* been overruled or superseded." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016). There is no indication that *Roger Williams* or its holding relating to anti-assignment clauses has been clearly

overruled or superseded. Thus, if the continued validity of *Roger Williams* is to be called into question, it will have to be by our Supreme Court. *Shah v State Farm Mut Automobile Ins Co*, ___NW2d___; 2018 Mich. App. LEXIS 2266, at *13-20 (Ct App, May 8, 2018)

STANDARD OF REVIEW

An appellate court reviews a motion for summary disposition De Novo. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). An appellate Court reviews a motion to amend a pleading is reviewed for abuse of discretion. *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997).

1. The Court of Appeals correctly determined that enforcement and interpretation of the contractual provision at issue violates public policy and common law.

a. "Public Policy" Defined.

Public policy was defined by this Court in *Skutt v Grand Rapids* and *Sipes v McGhee*, 316 Mich. 614, 623; 25 N.W.2d 638-624 (1947):

> "'What is the meaning of "public policy?" A correct definition, at once concise and comprehensive, of the words "public policy," has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the word "fraud" or the term "public welfare." In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.
>
> "'Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people,---in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be Constitution, statute or decree of court. It has frequently

> been said that such public policy is a composite of constitutional provisions, statutes and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the Constitution, we say it is prohibited by the Constitution, not by public policy. When a contract is contrary to statute, we say it is prohibited by a statute, not by public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone---the foundation---of all constitutions, statutes, and judicial decisions, and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first.'" [*Skutt, supra* at 264, quoting *Pittsburgh, C C & St L R Co v Kinney*, 95 Ohio St 64; 115 N.E. 505; 14 Ohio L. Rep. 489; (1916).

Similarly, "public policy" is what is just, right, reasonable, and equitable for society as a whole. McNeal, *Judicially determined public policy: Is "the unruly horse" loose in Michigan?*, 13 TM Cooley L R 143, 149 (1996).

In *Terrien v Zwit*, 467 Mich 56, 58; 648 NW2d 602 (2002) public policy was described:

> In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803), that the duty of the judiciary is to assert what the law "is," not what it "ought" to be.
>
> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. See *Twin City Pipe Line Co v Harding Glass Co,* 283 U.S. 353, 357; 51 S. Ct. 476; 75 L. Ed. 1112 (1931). The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy. As this Court has said previously:

> "As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours--of identifying priorities, weighing the relevant considerations and choosing between competing alternatives--is the Legislature's, not the judiciary's.'" [*Van v Zahorik*, 460 Mich. 320, 327; 597 N.W.2d 15 (1999)(citations omitted).]
>
> *Instructive to the inquiry regarding when courts should refrain from enforcing a covenant on the basis of public policy is W R Grace & Co v Local Union 759*, 461 U.S. 757, 766; 76 L. Ed. 2d 298; 103 S. Ct. 2177 (1983), in which the United States Supreme Court said that such a public policy must not only be "explicit," but that it also "must be well defined and dominant . . . ." As the United States Supreme Court has further explained:
>
> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. As the term "public policy" is vague, there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy. [*Muschany v United States*, 324 U.S. 49, 66; 89 L. Ed. 744; 65 S. Ct. 442 (1945).

As noted in *Rory v Continental Ins Co*, 473 Mich 457, 470-71; 703 NW2d 23 (2005):

> ..the determination of Michigan's public policy "is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." In ascertaining the parameters of our public policy, we must look to "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law."

b. Public Policy of the state of Michigan supports the assignability of a contract after performance/chose in action.

As set forth in the case law above, we can determine public policy by an examination of statutes and common law. An examination of our statutes and common law unquestionably leads to the determination that public policy finds that any prohibition upon the assignment of a contract after performance/chose in action is unenforceable.

1. The No Fault Statute allows for the assignment of a past or presently due benefit.

Our legislature enacted a statute in the No Fault act, MCL 500.3143; MSA 24.13143, that specifically dealt with the issue of assignments of No Fault Benefits. In the case of *Prof Rehab Assoc v State Farm Mut Automobile Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998), the Court of Appeals discussed the legislature's enactment of this statute:

> The statute at issue, MCL 500.3143; MSA 24.13143, provides in full: "An agreement for assignment of a right to benefits payable in the future is void. "We believe that this statutory language is "clear and unambiguous." *USAA Ins Co, supra* at 389. ***Under the plain language of the statute, "a right to benefits payable in the future" is distinguishable from a right to past due or presently due benefits. Keeping in mind our duty to discern and effectuate the intent of the Legislature, we believe that if the Legislature had intended to prohibit the assignment of all rights, it would not have included the word "future" in the language of the statute. The Legislature is presumed to have intended the meaning that a statute plainly expresses.*** *Institute in Basic Life Principles; Inc v Watersmeet Twp (After Remand),*217 Mich. App. 7, 12; 551 N.W.2d 199 (1996).

As the Supreme Court has held many times before, under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the specification in a statute of one particular class excludes all other classes. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003); *Dave's Place, Inc v Liquor Control Comm*, 277 Mich 551; 269 NW 594 (1936); *Detroit v Redford Twp*, 253 Mich. 453, 455-456; 235 N.W. 217 (1931); *Smitter v Thornapple Twp*, 494 Mich 121, 137 n 34; 833 NW2d 875 (2013). A Court cannot interpret language of a statute to create surplusage, (see, e.g., *Farm Bureau Ins Co v Chukwueke*, unpub COA op docket no. 306827 decided 1/17/13).

Because the Act specifically disallowed an assignment of *future* benefits, it therefore implicitly allowed assignment of all claims for *presently due or past due* benefits. Therefore, insurance policy provisions purporting to restrict such assignments are invalid. See *Auto-Owners Ins Co v Martin*, 284 Mich App 427; 773 NW2d 29 (2009) ("Insurance policy provisions that conflict with statutes are invalid").

In the same vein, "[i]nsurance laws and policies are to be liberally construed in favor of policyholders, creditors, and the public." *Depyper v Safeco Ins Co of America*, 232 Mich App 433; 591 NW2d 344 (1998). The Legislature intended to allow no-fault insureds some modicum of freedom to assign their rights under the no-fault act. When insurers point to anti-assignment clauses, they intend to destroy that freedom and subvert the legislative intent.

MCL 500.3145 is based upon Section 29 of the Uniform Motor Vehicle Accident Reparations Act (UMVARA), which was the basis of the Michigan No Fault Act. Section 29 (**Exhibit E**) proposed:

> "An assignment of or agreement to assign any right to benefits under this Act for a loss accruing in the future is unenforceable except as to benefits for:
>
> 1. Work loss to secure payment of alimony, maintenance, or child support; or
>
> 2. *Allowable expense to the extent the benefits are for the cost of products, services, or accommodations provided or to be provided by the assignee."*
>
> The commentary notes:
>
> "***One of the objectives of this Act*** is to pay benefits periodically (see Section 23) to sustain the person's suffering loss as expenses are accrued and, incidentally, ***to reduce the chances that payments will be applied to improvident purposes. This section prevents that***

objective from being circumvented by assignment of the right to benefits for future loss.

Two types of assignments which are not inconsistent with this objective are authorized. Paragraph 1 allows a person to satisfy familial support obligations through an assignment of rights to benefits for work loss. **Paragraph 2 allows an injured person to secure needed products, services and accommodations by authorizing assignment of benefits to hospitals, physicians, druggists and others providing those needs.**

Assignments permitted by paragraph 2 are only of those benefits which are attributable to the cost of the benefits, services, or accommodations provided. Section 23(a) permits an insurer to make direct payment to the suppliers even if no assignment of benefits has been executed."

Any argument that the language of MCL 500.3143 and UMVARA is not "identical" has been held to be immaterial - the Michigan Supreme Court has repeatedly looked to UMVARA for guidance in terms of policy and interpretation of the No Fault Act. See, e.g. *Manley v Detroit Auto Inter Insurance Exchange*, 425 Mich 140 (1986), the Supreme Court noted:

"***The commentary to the Uniform Motor Vehicle Accident Reparations Act (UMVARA) Section 23 is pertinent since the language is Sections 3110(4) and 3142(1) is substantially similar to the language in UMVARA, Section 23***.... The policy behind the UMVARA, Section 27 bar against judgment for future medical and other allowable expenses is that the Act 'mandates the full payment of medical expense, without temporal or dollar limits' and the only sure way to enforce this rule is to have the insurer pay all actual allowable expenses as they are incurred."

While the Michigan No Fault Act has no sections comparable to UMVARA, Section 27, I believe ***the provisions concerning when loss accrues and when expenses are payable by the insurer indicate a similar legislative intent that un-incurred expenses not be subject to a judgment such as that ordered by the trial court in this case***...."

See also *McDonald v State Farm*, 419 Mich 146 (1984), where The Michigan Supreme Court held:

> "*As we have explained previously, by adopting the language of such a model act (referring to the Uniform Motor Vehicle Accident Reparations Act), it is evident that the legislature 'was cognizant of, and in agreement with, the policies which underlie the model Act's language.*" *Miller v State Farm Automobile Insurance Company*, 410 Mich 538 (1981).
> . . .
> *A reading of both the clear language of Section 3107(b) and the drafter's comment to the Uniform Act leads us to conclude that work loss benefits are payables to compensate only for that amount that the injured person would have received had his automobile accident not occurred...*"

In *Miller v State Farm*, 410 Mich 538 (1981), where the Supreme Court compared Section 3108 of the Michigan No Fault Act with UMVARA, specifically noting the following:

> "Similarly, the pertinent portion of commissioner's comments to Section 1(a)(5)(iv) and (1)(a)(5)(v) of UMVARA, *which are in substance identical to Section 3106(2) of the house substitute*....
>
> Thus, it appears that the legislature's use of the language 'contributions of tangible things of economic value' in Section 3108 indicates an intent that survivor's loss benefits should at last roughly correspond to economic loss damages recoverable under our wrongful death act."

A no fault insurance policy cannot be more restrictive than the No Fault Act, and since this provision is more restrictive on the issue of "assignments" than the No Fault Act, it is void. As far back as 1980, in *DAIIE v Higginbotham*, 95 Mich App 213; 290 NW2d 414 (1980). the Court held:

"Where an insurance policy contains an exclusionary clause that was not contemplated by the Legislature, that clause is invalid and unenforceable." (Citations omitted).

It could not be clearer that the policy of the No Fault act was to allow for the assignment of benefits that are past or presently due. The policy behind this act, and specifically, to allow for the assignment of past or presently due benefits, was to ensure that the money for treatment was used for that purpose, and not an improvident

purpose. Future assignment were likewise barred for that very reason. Thus, the policy behind the No Fault Act is served by allowing for these assignments, particularly when they are to the providers who provide those services.

2. The UCC allows for the assignment of a health care receivable, further reflecting public policy allowing for assignments

Michigan's public policy of allowing for assignments, such as in the case at bar, for purposes of health care, is likewise found in the legislature's enactment of the UCC. The assignment of "health-care-insurance receivables" is dealt with at some length in the UCC. In short, *the Uniform Commercial Code, MCL § 440.9408, prohibits all restrictions on a health care provider's receiving and relying on a patient assignment of a benefit due in payment for services from an insurance company, declaring them to be "ineffective*".

MCL 440.9102(1)(b) defines "account" to include "health-care- insurance receivables." MCL 440.9102(1)(c) defines "account debtor" as "a person obligated on an account." MCL 440.9102(1)(bb) defines "debtor" to include a "seller of accounts." MCL 440.9102(1)(ss) defines "health-care-insurance receivable" as "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided."

The concept is simple - the medical services, once incurred, establish an insured's account receivable from his no-fault policy for payment of the bill. That right is essentially a security interest that must remain freely assignable. The terms "account," "health-care-insurance receivables," and "account debtor" are all defined to include an insurer that is responsible for payment of PIP benefits, and "debtor" is defined to include the patient who has assigned his right to payment from the insurer. Notably, accounts

due to a medical provider are carved out of the exceptions to the scope of Article 9.

MCL 440.9109(4)(h) states that Article 9 does not apply to "[a] transfer of an interest in or an assignment of a claim under a policy of insurance, *other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment* ... " (emphasis added). In other words, accounts due to a medical provider by assignment aren't excluded from Article 9.

Further, an assignment by a patient to his health care provider based on the account that is due from the insurer becomes a perfected security interest upon assignment. MCL 440.9309(e) states, "Each of the following security interests is perfected when it attaches .... (e) A security interest created by the assignment of a healthcare- insurance receivable to the provider of the health-care goods or services." So there can be no doubt that commercial law in Michigan was drafted in such a way to reflect the public policy of allowing the insured's assignment of insurance receivables to the medical provider in order to obtain medical services.

The UCC plainly prohibits all restrictions on a health care provider's receiving and relying on a patient assignment of a benefit due in payment for services from an insurance company, declaring such prohibitions to be "ineffective." MCL 440.9408 states, in pertinent part:

> (1) Except as otherwise provided in subsection (2) or (4), a term in a promissory note or in an agreement between an account debtor and a debtor that relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term does 1 or more of the following:

> (a) Would impair the creation, attachment, or perfection of a security interest.
>
> (b) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

Thus, by statute in Michigan, the insurer cannot rely on an anti-assignment provision of its policy, and cannot require consent. Any such statement that would impair the creation, attachment or perfection of the security interest in that receivable is "ineffective" and contrary to the public policy evidenced by our legislature in adopting the UCC. This is also clarified in the comments section to the law as of 2001. The Comments to this section state:

> 2. Free Assignability. *This section makes ineffective any attempt to restrict the assignment of a general intangible, health-care-insurance receivable, or promissory note,* whether the restriction appears in the terms of a promissory note or the agreement between an account debtor and a debtor (subsection (a)) or in a rule of law, including a statute or governmental rule or regulation (subsection (c)). This result allows the creation, attachment, and perfection of a security interest in a general intangible, such as an agreement for the nonexclusive license of software, as well as sales of certain receivables, such as a health-care-insurance receivable (which is an "account"), payment intangible, or promissory note, without giving rise to a default or breach by the assignor or from triggering a remedy of the account debtor or person obligated on a promissory note .... [italics added]

3. The Worker's Compensation act allows for assignments of benefits, further reflecting public policy allowing for assignments.

Michigan's public policy of allowing for assignments, such as in the case at bar, for purposes of health care in the Michigan Workers Disability Compensation act. MCL 418.821 provides in relevant part:

> (2) ***This section shall not apply to or affect the validity of an assignment made to an insurance company; health maintenance***

> ***organization*** licensed under former Act No. 264 of the Public Acts of 1974, or part 210 of Act No. 368 of the Public Acts of 1978, as amended, being sections 333.21001 to 333.21099 of the Michigan Compiled Laws; ***or a medical care and hospital service corporation*** organized or consolidated under former Act No. 108 or 109 of the Public Acts of 1939, ***or any successor organization making an advance or payment to an employee under a group disability or group hospitalization insurance policy which provides that benefits shall not be payable under the policy for a period of disability or hospitalization resulting from accidental bodily injury or sickness arising out of or in the course of employment.*** When a group disability or hospitalization insurance company; health maintenance organization licensed under former Act No. 264 of the Public Acts of 1974, or part 210 of Act No. 368 of the Public Acts of 1978, as amended; or a medical care and hospital service corporation organized or consolidated under former Act No. 108 or 109 of the Public Acts of 1939, or any successor organization enforces an assignment given to it as provided in this section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the worker's compensation recovery. (Emphasis added).

4. Statutory rights are assignable.

No fault benefits are statutory rights, as opposed to contractual rights. Statutory rights are assignable. One may have a contract to provide certain benefits, but the benefits are statutory. *Absent language in the statute to the contrary, statutory rights are assignable*. In *Grand Traverse Convention & Visitor's Bureau v Park Place Motor Inn, Inc*, 176 Mich App 445; 440 NW2d 28 (1989), Defendant had a judgment against it for assessments, interest, and penalties under the Community Convention and Tourism Marketing Act, MCL 141.871 *et seq.*; MSA 5.3194(381) *et seq.* 1984 PA 59 amended the act to require all convention bureaus operating under it to be nonprofit corporations, separate from the local chamber of commerce. MCL 141.872(e); MSA 5.3194(382)(e). Plaintiff duly incorporated as a replacement for the Traverse City Bureau. Traverse City Bureau was dissolved on April 1, 1985, but *assigned to plaintiff its interest in*

uncollected assessments. Defendant argued that the act did not authorize the assignment of assessments or causes of action to recover assessments due. The Court of Appeals disagreed, holding:

> The essential question is whether the act as a whole should be construed to allow assignments. In answering this question, our primary objective must be to give effect to the Legislature's intent. *Grand Trunk W R Co v Dep't of Treasury*, 170 Mich App 384, 388; 427 NW2d 580 (1988).
>
> MCL 141.876; MSA 5.3194(386) provides in part:
>
> (1) The assessment revenues collected pursuant to this act shall not be state funds. The money shall be deposited in a bank or other depository in this state, in the name of the bureau, and shall be disbursed only for the expenses properly incurred by the bureau with respect to the marketing programs developed by the bureau under this act.
>
> It appears to us that in order for the Traverse City Bureau to legally dispense funds due after its dissolution, it must first pay obligations properly incurred under its marketing program and then assign the remaining revenues to its successor bureau. We cannot perceive a contrary intention from the statute and conclude that the assignment from the Traverse City Bureau to plaintiff was permissible.

5. None of the public policy considerations in the state of Michigan that have been used to prohibit assignments in other cases apply.

Defendant/Appellant wants this Court to change public policy. It is asking this Court to do what it is loathe to do – "legislate from the bench". Michigan's Public Policy is extremely limited in terms of prohibiting assignment of a chose in action. In fact, it appears that the only chose in action that can be prohibited is a legal malpractice claim, as being champertous. "Champerty" was the common-law offense of assisting another to maintain a suit in exchange for a share of the proceeds. This the defense of champerty does not exist in Michigan except as specified by statute with regard to attorneys. *Grant v Stecker & Huff, Inc,* 300 Mich 174, 177; 1 NW2d 500 (1942); *Wildey v*

Crane, 63 Mich 720; 30 NW 327 (1886); see MCL 600.919; MSA 27A.919. See *Smith v Childs*, 198 Mich App 94, 98; 497 NW2d 538 (1993).

Thus, there is a specific statute that has been created to preclude the assignment of a chose in action; in other words, legislation. The public policy and reasoning for such a prohibition were described in the case of *Joos v Drillock,* 127 Mich App 99, 103-05; 338 NW2d 736 (1983):

> "It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.
>
> "* * * [The] ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an irresponsible client who, because of dissatisfaction with legal services rendered and out of resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession." 62 Cal App 3d 397-398.
> . . .

> We find that the personal nature of the relationship and the duty imposed upon the attorney, coupled with public policy considerations surrounding that relationship and any potential assignability of breaches thereof (giving rise to causes of action in legal malpractice) lead us to conclude that the legal malpractice claim is not subject to assignment." 83 Ill App 3d 338-339.

In the case at bar, we have none of the considerations that would result in a policy finding of non-assignability:

1. There is no personal relationship between an insurance company, whose only duty is to pay claims, and the insured, as there is with attorney and client;

2. The professional duties of an attorney to his or her client cannot be compared to the duties of an insurance company to its insured;

3. There is no unique confidentiality between a no-fault insurer and its insured, as there is with attorney and client.

4. We are not commoditizing a malpractice claim, but assigning a right to payment for services rendered, as provided under the insurance policy;

5. The assignee has a direct connection to the assignor (Provider/Patient), vs. a stranger to the transaction;

6. There is no debasement of the insurance industry by assigning a claim for payment for services, as there is with the assignment of a legal malpractice claim;

7. The very claim that is being assigned is the right to payment, the fundamental reason for no fault insurance; and

8. There is no statute prohibiting assignment, and in fact, a statute that allows for the same.

6. The public policy for allowing the assignment of a chose in action does not run afoul of the anti-assignment clause in the insurance policy.

The general rationale for the rule is that an anti-assignment clause is intended to prevent an insurance company only from taking on an insurance risk for which it did not bargain. If an insurance policy could be bought by one individual and then assigned to another, then the insurance company would be liable for an outsized risk that it was not able to price into its policy premium. See, e.g., *McHugh* v *Manhattan Fire & Marine Ins Co,* 363 Mich 324; 109 NW2d 842 (1961).

By contrast, where the loss has already occurred, then the insurance company's exposure is not in any way increased if the injured party's right to benefits under the policy is assigned to another. In that case, the assignee simply gets to do exactly what the assignor was entitled to do - the right to prosecute an accrued claim for known money damages. See *Wonsey* v *Life Ins* Co *of North America,* 32 F Supp 2d 939 (ED Mich, 1998) (stating rationale for rule).

In other words, a post-loss assignment is not an assignment of contract rights under the policy, but is instead an assignment of an accrued cause of action. "An assignment of the policy, or rights under the policy, before the loss is incurred transfers the insurer's contractual relationship to a party with whom it never intended to contract, but an assignment after loss is simply the transfer of the right to a claim for money. The entity asserting the claim under those circumstances has no effect upon the insurer's duty under the policy." *Wehr Constructors,* 384 SW3d at 683, citing 3 Couch on Insurance §35:9. As the Michigan Supreme Court stated, "[i]t is the absolute right of every person ... to assign such claims and such a right cannot be thus prevented." *Roger Williams,* 43 Mich at 254.

In the case at bar, assuming liability (injury from an auto accident, reasonableness of treatment, and reasonableness of cost) the insurance company is going to have to pay; it cannot show that it will be liable twice for the same bill - the obligation is to pay *the provider's* bill, not to simply give money to the insured; whether the money goes to the provider or the insured, there is only one payment to be made. If the money is paid to the provider, as opposed to the insured, the insured cannot complain - there is no longer any liability to the Provider for both the insured and the insurance company.

The argument proffered by Defendant/Appellant, that an insured would still owe duties to the insurance company under the policy, even after the assignment, is not a reason to change public policy or the law. If a policy holder still is contractually obligated to do things for the insurance company, that obligation does not change with the assignment.

7. Defendant/Appellant wants this Court to re-write public policy.

Let us be clear: Defendant/Appellant acknowledges that public policy in the State of Michigan prohibits assignment of a post-loss claim/chose in action. This is the public policy of the State of Michigan, and has been for over 130 years. Defendant/Appellant wants this Court to re-write that public policy; however, it gives no good reason to do so.

Defendant/Appellant created the very problem that it claims now exists, and now wants this Court to change 130 years of precedent and public policy in order to get out of having to pay for services that it is contractually and legally obligated to pay, under the mechanism (assignments) that it now seeks to invalidate.

Defendant/Appellant claims that the policy language is contained in over one million policies of insurance, and *Shah* affects those policies; however, State Farm, as well as all other insurance carriers who may have similar provisions, knew of (or should have known) of both the law of the state of Michigan and this state's public policy when it wrote those policies that it now claims will be affected by this law.

Defendant/Appellant argues that this is an issue in thousands of cases brought by providers; this, however, is not a "real" issue. These are post-loss assignments. That means that the liability is fixed. It is one thing to argue that the charges of the providers were unreasonable, or that the injuries didn't arise out of the auto accident, or that the treatment wasn't reasonable. This is an issue that would arise out of any no fault claim, regardless of who brought the claim. The "issue" is that Defendant/Appellant is arguing the efficacy of the anti-assignment clauses. This has nothing to do with any obligation under the No Fault act, but rather, is an obvious attempt to get out of paying. Defendant/Appellant is asking this Court to change the law, change public policy, so that it can get out of paying bills for reasons that have nothing to do with its liability.

In addition to the consequences set forth earlier in this brief, we must also deal with those cases currently pending, filed and/or amended to allege liability by way of assignment. If Defendant/Appellant is successful in persuading the Court to change the law and public policy, those thousands of provider cases that are pending may well be dismissed. Not just State Farm's claims, but any insurance carrier who claims to have an anti-assignment provision will seek to dismiss these claims. Doctors, hospitals, nurses, therapists, and other providers will now have to sue their patients, all of whom

operated under the law and public policy of the state of Michigan. The patients will now turn to their insurance companies, and say "pay this bill" and "defend me". The insurance companies will refuse, saying "we owe no obligation, because of the one year back rule". Thus, the real loss here will be suffered by both the providers, who won't get paid for their services, the insureds, who will be personally liable for medical bills that rightfully are the responsibility of the insurance companies, and who will now have to deal with litigation and judgments for bills that should have been taken care of by the carriers, and who have paid for policies, but not gotten what they paid for.

c. Rory v. Continental holds that Courts are obligated to apply public policy considerations to even the clearest of contracts, and does <u>not</u> hold that such decisions are to be made by the Insurance Commissioner.

The fundamental issue in *Rory* was the applicability of a one-year contractual limitations period. Plaintiff argued that that provision was "unreasonable". The trial Court and Court of Appeals agreed. The Supreme Court held that it was not the province of the Court to decide what was a "reasonable" provision, and that is the key to the *Rory* decision – a court cannot decide the "reasonableness" of a contractual provision.

Defendant/Appellant, however, tries to make *Rory* much more than it is. Defendant/Appellant argues that *Rory* stands for the proposition that approval of the policy by the commissioner of insurance is not only a declaration of the "reasonableness" of all provisions in the policy, but further, is a finding that the policy comports with every legal requirement for full enforceability – it cannot be questioned. This is simply not true.

This is not the first time that State Farm has tried to argue that approval pursuant to MCL 500.2236 is tantamount to a judicial proclamation as to the legality, enforceability, and applicability of a term in its policy of no fault insurance. In *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 648 NW2d 591 (2002), State Farm admitted that Plaintiff provided reasonable proof of the fact and of the amount of the loss sustained as required by MCL 500.3142. However, State Farm had in its policy a provision that conditioned payment of benefits on the submission by the insured to an EUO as often as reasonably asked. ***No provision of the no fault act allowed for the conditioning of payment upon submission to an EUO.***

The Supreme Court held that

> *"*EUOs, or other discovery methods that the parties have contracted to use, are only precluded when they clash with the rules the Legislature has established for such mandatory insurance policies. However, when used to facilitate the goals of the act and when they are harmonious with the Legislature's no-fault insurance regime, EUOs in the no-fault context should be viewed no differently than in other types of policies…"
>
> "an EUO that contravenes the requirements of the no-fault act by imposing some greater obligation upon one or another of the parties is, to that extent, invalid. Thus, a no-fault policy that would allow the insurer to avoid its obligation to make prompt payment upon the mere failure to comply with an EUO would run afoul of the statute and accordingly be invalid. However, an EUO provision designed only to ensure that the insurer is provided with information relating to proof of the fact and of the amount of the loss sustained--i.e., the statutorily required information on the part of the insured--would not run afoul of the statute."

There clearly was a provision in the policy that was unlawful under the no fault act. However, State Farm argued that it was approved by the insurance commissioner. The Supreme Court held:

> "Presumably, it was this approach to harmonizing agreed-upon contract terms with statutory requirements when reasonably possible that caused the Commissioner of Insurance, pursuant to his duties

> under MCL 500.2236(1), to approve this policy with its EUO provision. The commissioner has the duty to determine that all the statutory requirements of the no-fault act are complied with in insurance policies under MCL 500.2236(1) , which forbids the issuance of any insurance policy or indorsement "until a copy of the form is filed with the insurance bureau and approved by the commissioner as conforming with the requirements of this act and not inconsistent with the law."

So, there are two questions: what are the goals of the no fault act, and is there a way to harmonize the terms of the State Farm Policy with statutory requirements. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. *Shavers v Attorney General*, 402 Mich 554, 578-79; 267 NW2d 72 (1978). The No Fault Act allows for, and expresses the policy of allowing for assignments of past due and presently due benefits, as evidenced by MCL 500.3143, "An agreement for assignment of a right to benefits payable in the future is void", as well as subsequent case law interpreting the same.

There is a way to harmonize the goal of the no fault act and the "anti assignment provision" – it should be read as intended, to preclude the assignment of a future benefit, and to preclude the assignment of the policy itself, so as to prevent the insurance carrier from underwriting a risk to which it didn't agree.

One last point: The statute also provides for automatic approval of the policy language if the director fails to ack within 30 days of its submittal:

> Except as otherwise provided in this section, an insurer shall not deliver or issue for delivery in this state a basic insurance policy form or annuity contract form; a printed rider or indorsement form or form of renewal certificate; or a group certificate in connection with the policy or contract unless a copy of the form is filed with the department and approved by the director as conforming with the requirements of this act and not inconsistent with the law. ***A form is considered approved if the***

director fails to act within 30 days after its submittal under this section...

Thus, plainly illegal provisions could be "approved", simply by neglect. It is difficult to imagine that public policy is served by negligence.

d. Defendant/Appellant's cases regarding public policy are easily distinguishable from the case at bar.

Defendant/Appellant has cited a number of cases claiming that they do not support the public policy considerations relied upon by the Court of Appeals in the case at bar. Every one of the cases cited by Defendant/Appellant misses that mark.

For example, in *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 203-04; 747 NW2d 811 (2008), the issue was whether a contractual limitations period in an insurance policy is tolled from the time a claim is made until the insurance company denies the claim. In *McDonald*, it was noted that "the trial court also held that the one-year time limit was ***unreasonable***, concluding that the present case was directly analogous to *Rory." (emphasis added)* The Supreme Court, in overruling said decision, held that "We agree that the facts of *Rory* are squarely on point with this case, and for the same reason that we reversed the Court of Appeals decision in *Rory,* we decline to rewrite the parties' contract here."

The issue in *McDonald*, as it was in *Rory*, was whether or not the provision in the contract was "reasonable"; In the case at bar, we are not dealing with the issue of the reasonableness of the provision; we are dealing with its enforceability due to law and public policy. These are two very different things.

The public policy argument in *McDonald* likewise does not support Defendant/Appellant's claims, as it says we examine contracts for violation of policy based upon the law in effect at the time the contract was made:

> ***Plaintiff argues that, since our decision in Rory, public policy has changed to preclude limitations provisions shorter than three years and, therefore, that this provision should not be enforced because it is against public policy***. Specifically, plaintiff points to a "Notice and Order of Prohibition" issued by the Office of Financial and Insurance Services (OFIS) on December 16, 2005, prohibiting uninsured motorist benefits policies with limitations periods of less than three years. However***, the "Notice and Order" also expressly states that it does not prohibit insurers from continuing to use policies that were legally in use before December 16, 2005. Moreover, the general rule is that contracts are interpreted in accordance with the law in effect at the time of their formation***. See, e.g., *Byjelich v John Hancock Mut Life Ins Co,* 324 Mich 54, 61; 36 NW2d 212 (1949). ***Thus, the one-year limitation was valid at the time the parties entered into the contract***. Accordingly, we hold that the trial court erred in granting summary disposition to plaintiff on this basis. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 201; 747 NW2d 811 (2008) (Emphasis added).

In the case at bar, the "law in effect at the time of (the contract's) formation was *Roger Williams.* The law in effect clearly allowed for the assignment at issue. The public policy under *Roger Williams*, and the statutes that allow for the real party in interest to file suit in their own names, has not changed.

Similarly, Defendant/Appellant cites to the case of *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359, 362; 817 NW2d 504 (2012). There again, the issue before the court was the ***reasonableness*** of a 30-day notice provision regarding hit-and-run motor vehicle claims under the uninsured motorist (UM) Policy. This Court held that:

> "an unambiguous notice-of-claim provision setting forth a specified period within which notice must be provided is enforceable without a showing that the failure to comply with the provision prejudiced the insurer. Therefore,

> State Farm properly denied the claim for UM benefits sought in the instant case because it did not receive timely notice, a condition precedent to the policy's enforcement."

The Supreme Court specifically noted that "because providing UM coverage is optional and not statutorily mandated under the no-fault act, the policy language alone controls the circumstances entitling a claimant to an award of benefits." Once again, the discussed turned upon the "reasonableness" of the notice provision:

> Central to this Court's rationale was the right to contract freely. "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract."
>
> . . .
>
> We also reject plaintiff's assertion that enforcing the 30-day notice provision would violate MCL 500.3008. MCL 500.3008 requires liability insurance policies to provide that the failure to comply with a notice provision "shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible." *Because, in our judgment, plaintiff has failed to show that it was not reasonably possible to provide notice within 30 days of the accident or that providing notice 86 days after the accident was as soon as reasonably possible, we believe that it is unnecessary to consider whether the instant policy contained a provision comporting with the statute.* (Emphasis added).

Several cases relied upon Defendant/Appellant look at the application of policy terms or common law arguments to see if they are violative of the No Fault Act. Once again, these cases do not help Defendant/Appellant, and support Plaintiff/Appellee. In *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 582-83; 702 NW2d 539 (2005), the issue was whether or not the "one year back" rule could be judicially tolled. In finding that it could not, the Supreme Court held:

> The *Lewis* Court acted outside its constitutional authority in importing its own policy views into the text of § 3145(1). "The constitutional responsibility of the judiciary is to act in accordance with the constitution and its system of separated powers, by exercising the judicial power and only the judicial power."

Essentially, the statute contains its own limitations period, and the Courts cannot change the same.

This, however, is not the case in the case at bar; in fact, the statute prohibits assignment only of future benefits; past or presently due benefits, therefore, are freely assignable.

In the case of *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 227; 531 NW2d 138 (1995), the issue was whether or not a no fault policy would be interpreted as written, or if the policy as written was violative of the No Fault Act and therefore would not be enforced as written:

> We hold that the vehicle owner's policy at issue is invalid because it denies coverage for liability arising from use of an insured vehicle, in contravention of the no-fault act. Consequently, the policy will be deemed to provide primary coverage in an amount equal to that required by the no-fault act.
>
> . . .
>
> … *The first issue in both appeals is whether the owner's policy of automobile liability insurance, issued by Federated Insurance Company to the vehicle owner, contravenes the compulsory insurance laws of this state*. …
>
> In a sentence, Federated's insurance policy provides primary residual liability coverage only if the driver of a "covered" vehicle is uninsured or underinsured. In all other circumstances, Federated completely denies residual liability coverage for losses arising from the use of a "covered" vehicle. *This Federated cannot lawfully do because the no-fault act clearly directs that a policy sold pursuant to the act must provide residual liability coverage for* ***use*** *of the vehicle insured.*
>
> . . .

> *We question the premise of Federated's argument because it suggests that the financial responsibility act manifests the controlling public policy of this state concerning automobile insurance.*
>
> *The no-fault act, as opposed to the financial responsibility act, is the most recent expression of this state's public policy concerning motor vehicle liability insurance. Therefore, while Federated's insurance policy might well be reconciled with the financial responsibility act, its failure to comply with the no-fault act nevertheless renders it violative of public policy.* An insurance policy that is repugnant to the clear directive of the no-fault act otherwise cannot be justified by the financial responsibility act.

Defendant cites to the unpublished opinion of the Court of Appeals, *Kreindler v. Waldman,* ___NW2d___; 2006 Mich. App. LEXIS 945, at *7-8. This case has no application to the case at bar per MCR 7.215(1)(C). Defendant/Appellant has failed to show how this unpublished opinion, which fails to cite to *Roger Williams,* or the real party in interest statute or court rule, or provide any explanation for its reason from departing from these well-established principals (let alone even acknowledge their existence), applies to the case at bar.

Similarly, *Edwards v. Concord Development Corp*, ___NW2d___; 1996 Mich. App. LEXIS 1807 (Ct App, Sep. 17, 1996) is of no value to this discussion. Factually, *Edwards* cannot be compared to the case at bar. As the Court held in *Edwards*:

> Although plaintiff cites *Roger Williams Ins Co v Carrington*, 43 Mich. 252; 5 N.W. 303 (1880), to support its contention that non-assignment clauses are invalid, that case is distinguishable from the present case. In *Roger Williams*, the insurance company was attempting to avoid payment of its contract, whereas here, Hastings did not attempt to avoid its obligation under the contract; rather Hastings paid the full amount owed under the contract to plaintiffs.

Interestingly, State Farm is relying upon an unpublished opinion, that relied upon published opinion (*Roger Williams*) to say that *Roger Williams* is no longer good law.

e. Roger Williams is still good law.

In *Roger Williams Ins Co v Carrington*, 43 Mich 252, 254; 5 NW 303 (1880), a fire destroyed a livery stable and its contents. After the fire, the right to payment under the insurance policy had been assigned. The insurance carrier objected, and the Michigan Supreme Court held:

> The assignment having been made after the loss, did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person--secured in this State by statute--to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy.

This decision was made in 1880; it could have been made in 1980, or could have been decided yesterday. There is nothing about this decision that would have changed through the passage of time; the logic underpinning the decision is the same logic that makes it applicable today.

Defendant has argued that the statute referenced in the decision no longer exists. This is somewhat misleading, because while the statute no longer exists, the content of the statute remains through other statutes and court rules. The statute to which *Roger Williams* referred was CL 1871, § 5775, which provided that "[t]he assignee of any bond, note or other chose in action, not negotiable under existing laws, which has been or may be hereafter assigned, ***may sue and recover the same in his own name***, upon such bond, note or chose in action." The right of an assignee to sue in its own name, "the real party in interest rule," is now set forth at MCL 600.2041 and MCR 2.201(B).

MCL 600.2041 provides in relevant part that "Every action shall be prosecuted in the name of the real party in interest..." Prior codification of this statue is as follows:

RS 1846, ch. 13, § 27; RS 1846, ch. 99, §§ 1, 5; RS 1846, ch. 119, §§ 1–3, 5, 6; RS 1846, ch. 120, §§ 1, 7, 8, 15; CL 1857, §§ 326, 4155, 4159, 4911– 4913, 4915, 4916, 4918, 4924, 4925, 4932; Pub Acts 1863, No. 75, eff June 22, 1863; ***CL 1871, §§ 458, 5771, 5775***, 6624– 6626, 6628, 6629, 6631, 6637, 6638, 6645; Pub Acts 1881, No. 204, § 18; How §§ 464, 7153, 7340, 7344, 8212– 8214, 8216–8217, 8219, 8225, 8226, 8233; CL 1897, §§ 1081, 2466, 9781, 9787, 9788, 9795, 10050, 10054, 10476–10478, 10480, 10481; Pub Acts 1915, No. 314, ch. XII, § 2; 1929, No. 271, eff August 28, 1929 (former § 612.2).

Section 5775 became CL 1897, sec. 10054, which provided:

> ***The assignee of any bond, note, or other chose in action***, not negotiable under existing laws, which has been or may be hereafter assigned, ***may sue and recover the same in his own name***, upon such bond, note, or other chose in action, and defendant in all such suits may set up and avail himself of any defense he may have, arising before due notice of such assignment, and which accrued prior to such action, in the same manner and with the like effect as if the assignor had prosecuted the same in his own name.

In 1915, this statute was repealed, but replaced with chapter 12, section two: "***Every action shall be prosecuted in the name of the real party in interest***..." That statute itself was repealed and replaced by PA 1929 No. 271, section two: "***Every Action shall be prosecuted in the name of the real party in interest***..."

Today, not only do we have MCL 600.2041, but we have MCR 2.201(B) provides in part: "***An action must be prosecuted in the name of the real party in interest***." Per the commentary, "MCR 2.201 is substantially the same as GCR 1963, 201."

Ultimately, per Statute, Court Rule, and Common law, one who takes an assignment is the "real party in interest"; an assignee of a cause of action becomes the real party in interest with respect to that cause of action, inasmuch as the assignment vests in the assignee all rights previously held by the assignor. *Kearns v Michigan Iron & Coke Co*, 340 Mich 577; 582-584, 66 NW2d 230 (1954); *Burkhardt v*

Bailey, 260 Mich App 636, 653; 680 NW2d 453 (2004); *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 412; 875 NW2d 242 (2015); *Kearns v Mich Iron & Coke Co,* 340 Mich 577; 66 NW2d 230 (1954)

Keep in mind that *Roger Williams* specifically dealt with a non-assignment provision in the policy. Then, as now, the purpose of a non-assignment provision in a policy of insurance was to protect the insurer from an increase to the risk it has agreed to insure. The passage of time has not changed this. Time has not changed the idea that "the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer is a right to a money claim."

The passage of time does not automatically render a decision meaningless or inapplicable. In fact, the passage of time without changes to a decision or law can be itself an indication of the fundamental soundness of the decision. One need only look at the US Constitution, signed in 1787, as evidence of this fact.

Roger Williams has been cited numerous times for the proposition that post loss assignments cannot be prohibited by contract. These cases in Michigan alone include the following: *Marion v Vaughn*, 12 Mich App 453; 163 NW2d 239 (1968); *Spine Specialists of Mich, PC v Allstate Prop & Cas Ins Co*, ___F Supp 3d___; 2018 U.S. Dist. LEXIS 39801 (ED Mich, Mar. 12, 2018); *Estate of Grimmett v Encompass Indemnity Co*, ___F Supp 3d___; 2017 U.S. Dist. LEXIS 192289 (ED Mich, Nov. 21, 2017); *Covenant Med Ctr, Inc v Auto-Owners Ins Co*, ___F Supp 3d___; 2017 U.S. Dist. LEXIS 169278 (ED Mich, Oct. 13, 2017); *Benson v Assurity Life Ins Co*, ___F Supp 2d___; 2004 U.S. Dist. LEXIS 18953 (WD Mich, June 16, 2004); *Century Indemnity Co*

v Aero-Motive Co, ___F Supp 2d___; 2004 U.S. Dist. LEXIS 31180 (WD Mich, Mar. 12, 2004); *Century Indemnity Co v Aero-Motive Co*, 318 F Supp 2d 530 (WD Mich, 2003); *Action Auto Stores v United Capitol Ins Co*, 845 F Supp 417 (WD Mich, 1993).

f. State Farm has now changed its opinion on Assignments, and should be estopped from taking a contrary position.

When this Court decided *Covenant v. State Farm*, during oral argument, questioning turned to the protection of providers who provide services to the insureds. Attached as **Exhibit F** is a portion of the transcript from the oral argument. It was State Farm, who is also Defendant/Appellant in the case at bar, who suggested the idea of assignments, as a means to provide assurance for the provider, and told this Court that it would be beneficial to the insurance company. By way of illustration:

> JUSTICE BERNSTEIN: Well but -- but you're basically gonna codify the idea that it's -- it's basically your hospital is now gonna have to -- the only way that the hospital's gonna be able to collect is to go after the individual patients. And you pretty much know that individual patients are gonna be somewhat judgement- proof. ***So, for all intents and purposes, your goal is to kind of get the insurance companies out of it, which is gonna result in having hospitals have to come after patients***.
>
> MS. WHEATON: Not necessarily. ***They could go after patients, they could get an assignment of the claim from the patient --***
>
> CHIEF JUSTICE YOUNG: Was there an assignment here?
>
> MS. WHEATON: What?
>
> CHIEF JUSTICE YOUNG: Was -- was there an assignment here?
>
> MS. WHEATON: In this case, no.
>
> Covenant could not seek one. ***But you could seek one. And in fact, in that case, then there would be no question on the part of the insurance company. When resolving the claim they would have all the defenses available to it that it would have were it the injured person bringing the claim. And a resolution of that would -- would have some finality to it***. So they could sue the injured person, the injured

person could then bring in the insurance company, ***they could get an assignment and sue,*** or they could just take whatever they got and --and, you know, move on to the next -- (**Exhibit F**, Transcript, Oral Argument, 12/7/16, Covenant v. State Farm, at p. 2-3)

...

JUSTICE LARSEN: Is there any problem here that -- with respect to at least emergency room providers? They can't refuse service, so under EMTALA, various –

MS. WHEATON: Correct.

JUSTICE LARSEN: -- statutes. They can't refuse service. So it's not maybe quite like the roofer. The roofer can say, hey, I think you might be judgment proof for your insurance might not be so great, I'm not quite sure you're gonna get paid, or if you are gonna get paid, you're probably gonna go off to Vegas and spend the money and you'll never pay me, so I'm not gonna fix your roof. ***But if you show up at an emergency room, the hospital can't turn you away. Does that affect our thinking at all here?***

MS. WHEATON: No. Because again, they -- they can bring an action against that person, there is -- ***sometimes in some specific situations there is an assignment of rights built into the consent to treat.***

JUSTICE LARSEN: Oh, so that's interesting. ***So couldn't this whole problem be solved that way, if the providers just got an assignment of rights from everybody who showed up for treatment? Couldn't this problem just go away?***

MS. WHEATON: It --

JUSTICE LARSEN: I won't treat you unless you assign to me your rights under any insurance that you may have.

MS. WHEATON: ***It definitely decreases the problem. And when that happens, it helps the insurance companies***.... (**Exhibit F**, Transcript, Oral Argument, 12/7/16, Covenant v. State Farm, at p. 8-9)

. . .

JUSTICE LARSEN: Can I ask one more question? It -- it occurs to me that if we're thinking about assignment as a panacea and you go and you present at the emergency room and you say I just had this car accident, and the provider says, I won't treat you unless you assign me your claim, and you say, well sure, I just -- like I've got -- you know, I'm gonna die if

you don't treat me. Here's the claim. ***Are you worried that there will be suits about, you know, whether the assignment was made under duress or blah, blah,blah?***

MS. WHEATON: Me?

JUSTICE LARSEN: Is that something you're worried about?

MS. WHEATON: ***No. I mean, it might happen, but --***

CHIEF JUSTICE YOUNG: Should we --

JUSTICE LARSEN: But should we be worried about that?

MS. WHEATON: No, I don't think so. I mean, again, there's not always gonna be an assignment. I probably shouldn't have said that. But -- ***but what I'm saying is there is a way -- in response to Justice Bernstein's question, how can -- how can providers get paid? Well, that's one way. Suing the injured person and being brought in is another way. So even if the assignment is invalid, you could sue the injured person directly. They could bring in the in -- the injured person -- or the insurance company. There are ways***. **(Exhibit F**, Transcript, Oral Argument, 12/7/16, Covenant v. State Farm, at p. 18-19)

Michigan has adopted the "prior-success model" of judicial estoppel. See *Paschke v Retool Indus*, 445 Mich 502; 519 NW2d 441 (1994) (involving administrative proceedings). This means that a party must have successfully and 'unequivocally' asserted a position in a prior proceeding that is wholly inconsistent with the position now taken. The mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent." *See Henry v Dow Chem Co*, 319 Mich App 704, 727-28; 905 NW2d 422 (2017).

It is clear that State Farm was successful in *Covenant*; it is also clear that this Court accepted State Farm's position regarding assignments as true:

> In sum, a review of the plain language of the no-fault act reveals no support for plaintiff's argument that a healthcare provider possesses a statutory cause of action against a no-fault insurer. This conclusion does not mean that a healthcare provider is without recourse; a provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's reasonable charges (Footnote 40)…
>
> Footnote 40 provides:
>
> …Moreover, our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider. See MCL 500.3143; *Professional Rehab. Assocs. v State Farm Mut. Auto. Ins. Co.*, 228 Mich App 167, 172; 577 NW2d 909 (1998) (noting that only the assignment of future benefits is prohibited by MCL 500.3143).

State Farm is now demonstrating why Judicial Estoppel exists. Despite extolling the benefits and virtues of assignments before this Court, now it claims that they are "unworkable" and against their policy of insurance. State Farm is the only reason behind any alleged "problem" with assignments. These cases that are pending are not defended with arguments that patients are claiming that "I didn't agree to the assignment" or "I signed under duress." State Farm defends these cases by arguing that "our insurance policy prohibits assignments". State Farm cannot have it both ways.

g. Consideration of other State's "public policy" decisions do not support changing Michigan's public policy.

Defendant/appellant has reached out to other states to determine public policy; This is something of a fool's errand, as the determination of whether the free assignment of choses in action is the public policy of Michigan is an issue to which case law from other jurisdictions will not afford answers. Only by looking to Michigan statutes and Michigan case law can the public policy of this state be determined.

That being said, it is clear that most states would allow for the assignment of the chose in action, particularly in a no-fault setting. First, let us look to Illinois. Illinois was

not cited by Defendant/Appellant in its listing of foreign authority, which is particularly noteworthy because the insurance policy itself relies in part on Illinois law[2]. Illinois law would hold the anti-assignment language unenforceable. Per *Ginsburg v. Bull Dog Auto*, 328 Ill 571; 160 NE 145 (1928):

> After the contract has been fully executed and nothing remains to be done except to pay the money, a different rule applies. The element of the personal character, credit, and substance of the party with whom the contract is made is no longer material, because the contract has been completed and all that remains to be done is to pay the amount due. *The claim becomes a chose in action, which is assignable and enforceable* under section 18 of the Practice Act (Smith-Hurd Rev. St. 1927, c. 110). In *Sloan v. Williams*, 138 Ill. 43, on page 46, 27 NE 531, 532 (12 L. R. A. 496), it is said:
>
> *'It is true, that, after the contract has been executed by the person agreeing to perform such personal services, or exercise such personal skill, he may assign the right to recover compensation.* 3 Pom. Eq. Jur. § 1275, note 2, *574 supra.'
>
> In 26 Corpus Juris, 447, it is said:
> '*An assignment of the policy, after loss, may be made without notice or consent of the insurer, unless such consent or notice is required by statute. In the absence of such a statutory provision such an assignment is valid even though the policy provides that it shall be void if assigned, either before or after loss, without the consent of the insurer, for such an assignment relates to the cause of action and not to the policy.*'
>
> In May on Insurance, vol. 2, § 386, it is said:
> '*An assignment after loss is not the assignment of the policy, but the assignment of a claim or debt-a chose in action. *** An assignment after loss does not violate the clause in the policy forbidding a transfer even if the clause reads before or after loss. The reason of the restriction is, that the company might be willing to write a risk for one person of known habits and character and not for another person of less integrity and prudence, but after loss this reason no longer exists.*'
> ...
> *When the automobile was stolen and defendant refused to pay, a cause of action arose in favor of the insured. It became a chose in action and the policy became the evidence of the debt. The insured*

[2] Paragraph 14, page 38 provides that Illinois law controls as to disagreement and interpretation of the policies mutual conditions on the declarations page, if the policy was issued by SFMAIC.

> *had the right to assign this debt*, and when he did so plaintiff in error had a right to begin this suit.

See also *Illinois Tool Works, Inc. v. Commerce & Industry Ins. Co.,* 2011 IL App (1st) 093084, issued on December 12, 2011.

Defendant/Appellant cites to the New Jersey case of *Coalition for Quality Health Care v NJ Dep't of Banking & Ins*, 348 NJ Super 272; 791 A2d 1085 (Super Ct App Div, 2002). The logic of *Coalition* cannot apply to the case at bar, particularly because there is a markedly different statute in New Jersey, which clearly reflects the public policy of the State of New Jersey, as opposed to Michigan's No-Fault statute.

In 1998, the New Jersey Legislature enacted the "Automobile Insurance Cost Reduction Act" ("AICRA"), N.J.S.A. 39:6A-1, which made comprehensive changes to New Jersey's no-fault automobile insurance laws in an effort to "preserve the no-fault system, while at the same time reducing unnecessary costs" which allegedly had resulted in increased premiums. To facilitate implementation of these reforms the New Jersey Legislature granted the Commissioner of Banking and Insurance broad powers to "promulgate any rules and regulations . . . deemed necessary in order to effectuate the provisions of this . . . act." *N.J.S.A.*39:6A-1.2.

Thus, the New Jersey legislature specifically gave power to the commissioner to promulgate rules and regulations to effectuate the provisions of the AICRA; in other words, the legislature expressed the public policy of the state, by giving power to promulgate rules and regulations related to the no fault act, specifically to the commissioner. Michigan, however, did not enact a statute in its no-fault act authorizing the commissioner to promulgate rules and regulations relative to the No Fault act.

In fact, in *Coalition*, the implementing regulation provided that "[i]nsurers may file for approval policy forms that include reasonable procedures for restrictions on the assignment of personal injury protection benefits, consistent with the efficient administration of the coverage." *N.J.A.C.* 11:3-4.9(a). Again, in Michigan, we have nothing close to this legislative proclamation.

Finally, in *Coalition*, the plaintiffs did not challenge the validity of the regulation, but contended that the anti-assignment provisions approved by the DOBI were unreasonable. In Michigan, as we know from *Rory*, the Court will not look to the reasonableness of the contract; In *Coalition*, the Court specifically examined the provision for reasonableness ("Our consideration of the reasonableness of the disputed conditions is guided by the goals and purposes of AICRA and limited by the deference we must render to the DOBI and its Commissioner in approving those conditions") Thus, *Coalition* is of no help to this court.

Defendant/Appellant cites to *Parrish Chiropractic Ctrs, PC v Progressive Cas Ins Co*, 874 P2d 1049, 1051-57 (Colo, 1994) as being somehow reflective of public policy in Colorado. Since 2003, Colorado has not been a no-fault state, and thus, the "public policy" of Colorado cannot transfer over to Michigan. Moreover, after *Parrish* was decided, as admitted by Defendant/Appellant, Colorado changed its no fault act to specifically allow for the assignment to a health care provider.

Parrish was discussed at length in the Kansas case of *Bolz v State Farm Mut Automobile Ins Co,* 274 Kan 420, 431; 52 P3d 898 (2002). In *Bolz*, Plaintiff provider received an assignment from a patient injured in an auto accident. The anti-assignment language in the policy was, basically identical to the language in the case at bar "No

change of interest in this policy is effective unless we consent in writing." The district court ruled in favor of State Farm, specifically citing to *Parrish.* The Kansas Supreme Court, upon its own motion, took the case from the Court of Appeals, and held that the provision was unenforceable, holding:

> "This concept of assignability of choses in actions remains ingrained in the public policy of this state."
>
> "In addition to the public policy favoring assignability of choses in action, we note that restraints on the alienation of property are strictly construed against the party urging the restriction."
>
> "State Farm asserts that Section 322 (of the restatement) does not restrict the freedom of contract by referring to the comment to that section, which states: ***"In the absence of statute or other contrary public policy, the parties to a contract have power to limit the rights created by their agreement***. The policy against restraints on the alienation of property has limited application to contractual rights." ***This language, however, is consistent with Dr. Bolz' argument that Kansas public policy and statutory provisions prohibit nonassignability and prevail over freedom of contract***.
>
> "In *Augusta*, this court discussed general rules of assignment, noting: "As a general rule, a contract is not assignable where the nature or terms of the contract make it nonassignable. 6A C.J.S., Assignments § 30, p. 630. But, ***logically, if the parties are to be held to have agreed to make the contract or particular rights thereunder nonassignable, then it should have been a negotiated contract. This distinction is perhaps one of the major reasons that assignments of insurance benefits after loss are generally enforced despite contractual provisions precluding assignment***. See 43 Am. Jur. 2d, Insurance §§ 689-690, pp. 686-688; 46 C.J.S., Insurance § 1152, p. 35, § 1190, p. 106; Annot., 122 A.L.R. 144 (1939)."
>
> ***"The public policy in favor of the assignability of choses in action did not prevail in Augusta because the legislature had enacted laws favoring health care cost control and insurance contracts that required the insureds to use the services of specified member health care providers and member hospitals. It is important to note that neither of these factors is present in this case."***

In specifically dismissing the *Parrish* comparison, the *Bolz* court held:

> ***We note that effective January 1, 1994, the Colorado Legislature clearly stated its public policy by passing an amendment to the Colorado Auto Accident Reparations Act, Colo. Rev. Stat. § 10-4-701 (2001) et seq., requiring insurers to allow an insured to assign payments due under the policy to a licensed hospital or other licensed health care provider for services provided to the insured that are covered under the policy***. See Colo. Rev. Stat. § 10-4-708.4 (2001); 874 P.2d at 1055 n.9.
>
> . . . . ***Finally, Parrish conflicts with this court's recent decision in Brenner v. Oppenheimer & Co., 273 Kan. , Syl. P6, 44 P.3d 364 (2002), in which a unanimous court recognized that contracts that contravene the settled public policy of the state will not be enforced***...
>
> Beyond freedom of contract, State Farm fails to state any overriding public policy exception to the general rule that post-loss assignments are valid even in the face of nonassignment clauses. Thus, the case is distinguishable from *Augusta Medical*and *St. Francis*. We find, therefore, under the circumstances, that the policy provision restricting the assignment of Emerson's right to collect a post-loss benefit is against the public policy of Kansas and will not be enforced."

Similarly, the Court in *Bolz* found support of the public policy allowing for assignments in the statutes of the state of Kansas:

> "The free assignment of post-loss PIP benefits was provided for by the legislature in regulating accident and health insurance policies and was also required under the uniform policy provisions. In doing this, the Kansas Legislature specifically mandated Kansas public policy. Therefore, we find that a provision within an automobile insurance policy which restricts the assignment of an insured's right to collect post-loss PIP benefits violates Kansas statutes and will not be enforced. The assignment of the insured's right to receive a post-loss PIP benefit to the medical practitioner that provided the medical services is enforceable as a matter of Kansas public policy and under the statutes of this state."

Bolz refers to the Georgia case of *Santiago v. Safeway Insurance Co.*, 196 Ga. App. 480, 396 S.E.2d 506 (1990). In *Santiago,* the Georgia court held that a health care provider could maintain an action for benefits when assigned no-fault benefits due under the insurance policy despite a non-assignment clause, holding:

> "'After [a] loss, the claim of the insured, like any other chose in action, could be assigned without in any way affecting the insurer's liability. It has been held, rightly we think, that a condition in a policy of . . . insurance prohibiting an assignment or transfer of the same after loss, without the consent of the insurer, is null and void, as inconsistent with the covenant of indemnity and contrary to public policy . . . . ***No right of the insurer being affected by the assignments of the policies, it would be a mere act of caprice or bad faith for it to take advantage of the stipulation that the transfers were subject to its consent, by withholding such consent in order to defeat the claim of the assignee***..."

The similarities between the common law and statutory framework of Kansas and Michigan, and the facts in the case at bar, supports the finding and holding of the Court of Appeals in the case at bar, as being a fair and just application of the Public Policy of the state of Michigan.

CONCLUSION/RELIEF REQUESTED

Wherefore, for the reasons set forth above, Plaintiff/Appellee prays that this Honorable Court deny Defendant/Appellant leave to appeal this matter.

Dated: July 3, 2018

GREEN AND GREEN, PLLC

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